GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
WASHINGTON, D. C. 20301

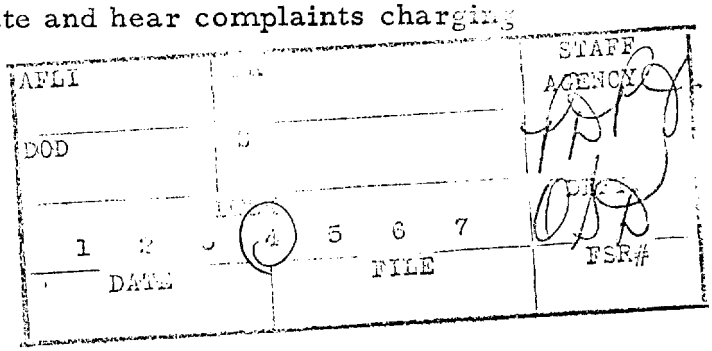
6 July 1970

Honorable Thaddeus J. Dulski
Chairman, Committee on Post Office
and Civil Service
House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

It is requested that the following views of the Department of Defense be included in the Committee's consideration of S. 782, a bill "To protect the civilian employees of the executive branch of the United States Government in the enjoyment of their constitutional rights and to prevent unwarranted governmental invasions of their privacy."

S. 782 would, subject to certain exceptions, make it unlawful to require or request a civilian employee, or person seeking employment in the executive branch of the United States Government, to disclose his race, religion, or national origin, or that of any of his forebears; attend meetings or to participate in activities unrelated to the performance of his official duties; report outside activities or employment unless there is reason to believe that these activities conflict with his official duties; submit to questioning about his religion, personal family relationships or sexual attitudes through interviews, psychological tests or polygraphs; support political candidates, or attend political meetings; buy bonds or other obligations issued by the United States; disclose any items of his or his family's property or income other than specific items tending to indicate a conflict of interest with respect to the performance of any of his official duties; or submit, when he is under investigation for misconduct, to interrogation which could lead to disciplinary action without the presence of requested counsel. To provide enforcement powers, the bill vests jurisdiction in the United States District Courts to hear cases under the Act and to provide injunctive relief. It also provides for a Board on Employees' Rights to investigate and hear complaints chargi



violation or threatened violation of the Act. The Federal Bureau of Investigation is exempt from the bill, whereas the CIA and the NSA are granted limited exceptions.

As the biggest single employer within the executive branch, the Department is mindful of its responsibilities to insure a proper balance between individual rights and management of objectives. The basic objective of S. 782 is laudable -- that respect for human dignity must be an essential ingredient of the Federal Government's employment policies -- that its employees do not surrender their rights to respect from their employer. But S. 782 has not fully considered the Government's interest and has created a system of remedies which are cumbersome, contrary to well accepted tenets of Government's administration, and in some instances prejudicial to the Department's mission.

S. 782 contains substantially the same provisions as those contained in S. 1035, 90th Congress, to which the Department of Defense voiced objections. The principal points of disagreement related to the adverse impact the bill would have on the personnel administration of the Department of Defense and the equally adverse impact it would have on the operations of the essential personnel security programs, particularly those involving highly sensitive operations of the Department of Defense. Inasmuch as these same provisions are carried over into S. 782, the Department is opposed to its enactment in its present form.

In the view of the Department, the proper exercise of its executive responsibilities would be hampered for the following reasons:

(1) The bill fails to distinguish between eligibility for government employment in general, and the special responsibilities of a national security nature entrusted to the Department. The business of inhibiting espionage by careful selection of persons to be given access to sensitive information is extremely difficult at best. Without adequate information concerning the background, affiliations, personal relationships, mores, and financial and general integrity of persons considered for such access, it may well be impossible. It is essential that, as the sensitivity of a position increases, the Department must be permitted to broaden the scope of its inquiries.

(2) The bill fails to provide the Secretary of Defense with the authority to exempt from its provisions certain sensitive activities of the Department, despite the fact that those activities involve access to classified defense information of the highest national importance. The exemption authority granted to the FBI is based on a recognition of the sensitivity of its mission and, for the same reasons, should be extended to the NSA and to such other elements of the Department of Defense when the Secretary determines that the Act cannot be applied in a manner consistent with national security requirements.

(3) The provisions permitting civil actions to be filed in the United States District Court without claiming damages or exhausting administrative remedies are disruptive to the Department's grievance procedures and to employee-management relationships. To permit disregard of the jurisdictional prerequisites to judicial review would most certainly encourage the filing of spurious suits and open the door to broad and possibly organized harassment of executive actions.

(4) The provision authorizing the Board on Employees' Rights to reprimand, suspend or remove civilian violators is in derogation of the responsibilities of the employing agency and of the Civil Service Commission.

(5) The effectiveness of the employee organization system of representation established by Executive Order 11491 would be seriously disrupted. Under section 4, an employee organization could join in a court suit at the employee's request, even though the organization does not represent the employees of that Defense activity. Under section 5, an employee organization could intervene in proceedings before the Board on Employees' Rights if "in any degree [it is] concerned with employment of the category in which any alleged violation of this act occurred." In this instance, it could intervene without regard to the wishes of the complaining employees.

Of particular concern to the Department of Defense is the fact that S. 782 discriminates against military supervisors by subjecting them to court-martial action in the event they commit any of the prohibited acts. The Department concurs in the concept that, if S. 782 is enacted, it should apply to military officers who supervise civilians in the same measure that it applies to civilian supervisors. But under the terms of the bill, civilian supervisors would not be subject to criminal charges, whereas the Board on Employees' Rights could direct military authorities to institute court-martial action against a military supervisor. In our view, this distinction in treatment is patently discriminatory, if not constitutionally questionable.

Actually, an employee is not without remedy if he has cause to believe that his military superior is committing a wrong constituting a crime under the Uniform Code of Military Justice. Under paragraph 29 of the Manual for Courts Martial, 1969, any person having knowledge of the offense may present a violation of the act to duly constituted military authorities.

By law and executive branch directives, the NSA is charged with the duty to provide the highest degree of protection to sensitive cryptologic information. To this end, Congress has enacted a specific statute governing the personnel security operations in NSA. In the view of the Department, S. 782 would unduly restrict the effective execution of these responsibilities.

In addition, the bill does not take into account other Department of Defense operations relating to intelligence and national security matters. For example, the Department has a number of positions requiring access to nuclear weapons and nuclear weapons systems and operational war plans. In addition, it has a number of intelligence elements which deal with intelligence sources which are as sensitive as those in the CIA, FBI and NSA. Obviously, CIA, NSA, and FBI information must be disseminated to selected personnel throughout the Department of Defense. Consequently, any added measure of personnel security by these agencies is wasted unless it is matched within the Defense Department. We are concerned that the Secretary of Defense should be in a position to assure consistency of Defense policy in this overall area and to apply a like policy to all elements of the Department of Defense engaged in similar activities.

Because of the special responsibilities of a national security nature entrusted to certain departmental personnel, it is absolutely essential that the Department fully explore into their background, affiliations, personal relationships, mores, and financial and general integrity. If the Department is to inhibit espionage and prevent damaging leaks in its national intelligence system, it must utilize, under appropriate controlled circumstances, psychological testing, polygraphs and conduct interrogations over and above those required of the general civil service.

However, in the event that your Committee, notwithstanding the above, wishes to give favorable consideration to S. 782, the Department of Defense strongly recommends, in recognition of the demands of national security, that section 9 of the bill be modified to read: "This act shall not be applicable to the Federal Bureau of Investigation, the National Security Agency, the Central Intelligence Agency, and to other elements of a Federal department or agency having critical-sensitive positions if the head of that department or agency personally determines that this act cannot be applied to these elements in a manner consistent with national security requirements." A "Section by Section Analysis" of the bill as it relates to personnel management problems and to classified activities not expressly exempted by the language suggested above is attached. It includes recommended language changes.

The Office of Management and Budget advises that from the standpoint of the Administration's program there is no objection to the presentation of this report for the consideration of the Committee, and that the enactment of S. 782 in its present form would not be consistent with the program of the President.

Sincerely,

L. Niederlehner
Acting General Counsel

Attachment

# SECTION BY SECTION ANALYSIS

Section 1(a) would prohibit, with certain exceptions, inquiries about an employee's race, religion or national origin or that of his forebears. It is recommended that the second proviso beginning on page 2, line 11be amended to read, in part: "Provided further, That nothing contained in this subsection shall be construed to prohibit inquiring concerning the citizenship or the national origin of any employee or of any person seeking employment, or the national origin of any person connected with either by blood or marriage, when such inquiry is deemed necessary or advisable ***." (emphasis added) The need for broadening the category of persons exempted is especially important where an applicant or an employee is to be assigned to overseas areas where coercion might be brought against him or his close relatives.

Section 1(b), in protecting an employee against compulsory attendance at meetings, forbids taking notice of an employee's participation in subversive activities or with other groups whose interests might be hostile to United States interests. Such a restriction is strongly opposed by the Department, and is contrary to well accepted security practices. Accordingly, it is recommended that a proviso be added to section 1(b) reading, as follows: "Provided further, That nothing in this subsection shall be construed to prohibit taking notice of the participation of an employee in the activities of organizations, groups, and movements deemed relevant to the national security."

Section 1(c) would prohibit requiring an employee to participate in activities unrelated to his official duties or to the development of work skills. It is assumed that the term "official duties" is to be broadly construed and that it would not bar issuing instructions and guidance to persons assigned to sensitive duties. For example, such employees may be required to report security violations, attend security indoctrination lectures, and report definite indications of mental instability and other unusual behavior on the part of other similarly assigned employees. With the understanding that these precautionary measures are part of the "official duties" of every such employee, the Department of Defense interposes no objection to this section.

Section 1(d) would prohibit requiring or requesting an employee to make any report concerning his activities or undertakings unless they relate to the performance of his official duties, the development of his

work skills, or there is reason to believe that he is engaged in outside activities or employment in conflict with his official duties. The Department recognizes that this provision was designed to eliminate certain improper reporting practices, and in this respect we support the principle behind this provision. However, there are some instances in which there is a good and sufficient cause for requiring such reports. For example, it may be necessary to determine whether an employee is engaged in political activities proscribed by the Hatch Act. Obviously, the best way to ascertain the facts is to ask the employee for an explanation. It is also important that an employee assigned to sensitive duties report any approach by known intelligence agents, his planned travel to communist-controlled countries, or his attendance at such meetings where representatives of such countries will be in attendance. To make provisions for these special circumstances, it is recommended that a proviso be added at the end of page 4, line 8, reading substantially as follows: "Provided, however, That nothing contained in this subsection shall be construed to prohibit requesting a report when necessary for law enforcement purposes or when the employee is assigned to activities or undertakings related to the national security."

Section 1(f) would prohibit requiring or requesting an applicant or an employee to take a polygraph test regarding his "personal relationship" with his relatives, his religious beliefs, or his attitude or conduct with respect to sexual matters. Under Department of Defense Directive 5210.48, July 13, 1965, polygraph examinations may be conducted only with the prior written consent of the individual, and if he refuses, no adverse action may be taken by the Department. It is believed that this policy should be continued, and that polygraph tests should be permitted in specific security cases which cannot otherwise be resolved, provided the individual voluntarily consents. Accordingly, it is recommended that a clause be added beginning on line 19, page 5, reading as follows: "unless the employee voluntarily consents to such a test in order to resolve specific questions not otherwise resolvable relating to his suitability for employment or suitability for assignment to activities or undertakings related to the national security."

Section 1(g) would prohibit coercion of any employee to contribute to the nomination or election of a person or groups of persons to public office. The Department of Defense supports the objectives of this section.

Section 1(h) would bar coercion in bond drives and fund-raising campaigns, and in that sense reflects the firmly established policy of the Executive

Branch and of the Department of Defense. When allegations of coercion have come to the Department's attention -- and they have been relatively few -- generally they could not be substantiated. In the few instances in which the allegations were verified, it was due for the most part, to errors of judgment, excessive zeal or misunderstood communications, rather than any criminal intent to compel or coerce others. Nevertheless, section 1(h), when taken in conjunction with sections 3, 4 and 5(l) would make such acts unlawful, and in the case of a military offender, a basis for court martial action. The Department of Defense does not consider criminal sanctions in the case of military personnel, or the sanctions contemplated in the bill for civilian personnel, as either enlightened, effective, or appropriate measures for dealing with such conduct. Administrative personnel action is eminently more suitable. We are convinced that creating a specific new crime or establishing specific new sanctions in the context of demonstrably worthy purposes -- the encouragement of bond purchases and the support of charities -- is neither necessary nor desirable. Furthermore, should a military officer deliberately disregard administrative instructions, ample authority already exists to charge him for failure "to obey any lawful general order or regulation" under Article 92 of the Uniform Code of Military Justice (10 U.S.C. 892). Consequently, the Department of Defense believes that it already has sufficient authority to deal with this kind of coercion complaint.

Section 1(i), by placing restrictions on requiring or requesting an employee to disclose financial information, seriously handicaps the Department's ability to evaluate an individual's personal financial stability and susceptibility to bribes or other financial pressures. Oftentimes sufficient financial information cannot be obtained simply by checking credit agencies, creditors, or other financial institutions. In many instances, the employee must be interviewed and a frank discussion held in order to find the basis for his financial irresponsibility or unexplained affluence. Should the right to make informal inquiries be denied, the Department may be required to initiate disciplinary or removal actions on the basis of information which does not include the employee's denial or explanation. Thus the prohibition not only blunts the Department's investigative effort, but also may operate to the detriment of the employee. Accordingly, it is recommended that the following proviso be added following the first proviso on page 7: "Provided further, That this subsection shall not apply to any employee whose financial responsibility or unexplained affluence has come into question in regard to determining his suitability for assignement to activities or undertakings related to the national security."

Section 1(j) prohibits requiring an employee, excluded from the protections afforded by section 1(i), to disclose his finances or those of his family except specific items tending to indicate a conflict of interest. It is not clear whether the employee may elect to disclose financial data in a conflict of interest situation, or whether the Department may conclude that a possible conflict exists and that the employee should therefore reveal his financial condition. Under 18 U.S.C. 208 an employee is required to make a full disclosure of his financial interests if he participates personally in his Governmental capacity in any matter in which he, his family or business or associate has a financial interest. Under that statute his failure to make a positive disclosure subjects him to possible criminal prosecution. It is believed that this section should be reconsidered.

Section 1(k) would prohibit interrogation of an employee "under investigation for misconduct" without the presence of counsel, or other person, if he so requests. The Department recommends that the words "or other person of his choice" be deleted from lines 5 and 6 of page 8. Since this section is designed to protect an employee's legal rights, it is questionable whether the presence of non-legal counsel would assure that protection. Further, this outside party might also be directly or indirectly involved in the investigation, in which event his presence would not be in order.

It is assumed that section 1(k), by providing for the right of counsel to be present, does not carry with it the obligation of the Government to furnish counsel. In some situations, the Department has made available a Government lawyer to insure that the employee has a proper understanding of his rights and obligations. But as a general rule, the Department does not have the capability to furnish a legal adviser in all possible situations covered by section 1(k).

It is also assumed that preliminary questioning to establish whether or not there has been misconduct in the performance of official duties would not be considered within the coverage of section 1(k). In this respect, the Department distinguishes this kind of questioning from the formal questioning which would follow after preliminary inquiries have established the misconduct. To construe this section otherwise would mean that a supervisor's ability to resolve day-to-day employment incidents and to provide constructive guidance concerning an employee's job performance would be replaced by time consuming and expensive legal consultations.

Section 1(1) prohibits reprisals against an employee who refuses to submit or comply with any requirement made unlawful by S. 782, or who avails himself of the remedies provided by the bill. Reprisals would include discharge, discipline, demotion, denying promotion, relocation, reassignment, or otherwise discriminating in the terms of his employment. While the Department agrees that reprisals have no place in personnel management programs, section 1(1) does raise some practical operating problems. For example, the Department may receive reliable information that an employee occupying a sensitive position has been spending large sums of money far beyond his normal income and that he has been seen in company with foreign agents. Should he be questioned about his unexplained affluence, and should he refuse to answer, the Department might elect to reassign him, pending completion of the investigation. Thereupon, the employee could charge that this action constituted a reprisal within the meaning of section 1(1), when, in fact, the reassignment was but a reasonable and necessary precautionary measure. Under these circumstances, it is believed that this section should be modified by deleting the words "relocate, reassign" from line 14, page 8. The Department should not be foreclosed from taking action of this nature to protect the national security under pain of being threatened with a lawsuit.

Section 2 makes it unlawful for Civil Service employees to violate or attempt to violate any of the provisions of section 1. The Department defers to the views of the Commission on this section.

Section 3 prohibits a military supervisor from requiring or requesting a civilian employee to perform any act or submit to any requirements made unlawful by section 1. The Department agrees that the bill should apply to military officers supervising civilians in the same manner that it applies to civilian supervisors. But section 3, when taken in conjunction with section 5(1), discriminates against military officers by singling them out from all other members of a class and making them the only supervisors who are subject to criminal penalties for misconduct. Because of this, these provisions appear constitutionally questionable and should not be enacted. Actually, an employee is not without remedy if he has cause to believe that his military superior is committing a wrong constituting a crime under the Uniform Code of Military Justice. Under paragraph 29 of the Manual for Courts Martial, 1969, any person having knowledge of the offense may present a violation of the act to duly constituted military authorities. Additionally, from a technical drafting standpoint, section 3

should be modified to read, in part: "*** under his authority to act with regard to any civilian employee of the executive branch of the United States Government under his authority or subject to his supervision in a manner made unlawful by section 1 of this Act." Section 1 prohibitions are not all cast in terms of "request and require."

Section 4 provides that an employee may sue to enjoin a violation or threatened violation of sections 1, 2 or 3, or obtain redress therefrom without alleging damages or exhausting any administrative remedy. Also, with the employee's consent, any employee organization may file the suit or intervene. The Department is opposed to section 4 for a number of reasons. It would actively encourage the avoidance of agency procedures and permit the filing of frivolous suits. It would overburden the courts inasmuch as evidentiary hearings would be required in many cases. It would undermine grievance and adverse action procedures under the mistaken assumption that present employee grievances are not fairly considered. It would create an independent remedy for one group of grievances, whereas all other grievances would continue to be processed through normal agency grievance procedures. It would vest in employee organizations the right to bring suit or intervene, with the employee's consent, even though the organization has no identifiable interest with the activity with which the employee is assigned, a concept contrary to well accepted principles of employee-management relationships. To meet these objections, it is recommended that the phrase reading, "without regard to whether the aggrieved party shall have exhausted any administrative remedies that may be provided by law," appearing on lines 10 - 12 of page 12, be changed to read, "when the aggrieved party shall have exhausted any administrative remedies that may be provided by law." In addition, it is recommended that the last two sentences of section 4 appearing on pages 12 and 13 be deleted.

Section 5 would create a Board on Employees' Rights to investigate complaints of violations or threatened violations and to conduct hearings. The Board would be empowered to reprimand, suspend, or remove civilian officials violating the act. Military violator cases would be referred to the military departments for prosecution under the Uniform Code of Military Justice. Federal employee organizations could intervene in the proceedings if they are "in any degree" concerned with employment of the category in which the alleged violation occurred. The Department is opposed to the creation of an independent Board, and to the provision calling for the court-martial of military supervisors. Under this section, agency grievance procedures could be circumvented by

permitting an employee to file a complaint directly with the Board. It would impinge upon the authority of the appointing agency by vesting disciplinary action in an outside agency instead of the appointing agency or the Civil Service Commission. As to the Board's action against military violators, it would create a number of problems. The investigation, hearing and report of the Board would have little direct effect on any court-martial proceedings since these actions would not appear to qualify as a pretrial investigation under Article 32 of the Uniform Code of Military Justice. But, the Board's report recommending court-martial proceedings would raise the spectre of "command influence" since the Board's report would be submitted to the President, the Congress, and the general courts-martial convening authority. It would also violate employee privacy by permitting intervention by employee organizations without regard to the wishes of the employee, and would negate the employee-management system established by Executive Order 11491.

If the Congress decides section 5 should be retained overthe objections of the Department, it is recommended that the first sentence of section 5(h) beginning on page 14 be deleted and a new sentence substituted reading substantially as follows: "The Board shall not entertain a complaint from or on behalf of an aggrieved party, unless the remedy sought by him shall have been denied in whole or in part by a final agency decision." Further, in order to provide for the observance of the procedural protections afforded civilian violators by title 5, United States Code, it is recommended that section 5(k)(3)(A) be deleted and the following substituted: "in the case of a civilian officer or employee of the United States, other than any officer appointed by the President, by and with the advice and consent of the Senate, who violates this act, forward its decision to the agency for determination of the severity and application of the penalty to be effected consonant with statutory protections afforded by title 5 of the United States Code."

Section 10 provides that each department may establish its own grievance procedures, but that these procedures shall not preclude a suit under section 4 or a complaint to the Board on Employees' Rights under section 5. The Department firmly believes that an employee should first seek relief through his own department's grievance procedures, and that outside review should be permitted only after completion of Departmental action. Accordingly, the phrase, "but the existence of such procedures shall not

preclude any applicant or employee from pursuing the remedies established by this Act or any other remedies provided by law," appearing on lines 12 -15 of page 20 of the bill, should be deleted. To provide three alternative means of resolution of this particular type of grievance -- one through the traditional grievance system, one through the newly created, but yet administrative, Board on Employees' Rights, and one through immediate access to the United States District Courts, increases the prospects of divergent interpretations which will operate to the advantage of neither the employee nor his supervisor.